BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WAYNE HEDBERG, Claimant, vs. JBS SWIFT & COMPANY, Employer, and ZURICH NORTH AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	FILED JAN 8 2016 WORKERS' COMPENSATION File No. 5036162 REMAND DECISION Head Note Nos.: 1704; 1803; 1804; 4100

STATEMENT OF THE CASE

This matter is before the Iowa Division of Workers' Compensation on remand from the Iowa Court of Appeals following a decision on appeal filed on January 14, 2015.

This case originally proceeded to an arbitration hearing on June 28, 2012. The presiding deputy workers' compensation commissioner entered an arbitration decision on October 10, 2012, and awarded claimant 80 percent industrial disability. Claimant appealed that decision to the Iowa Worker's Compensation Commissioner. Former Commissioner Godfrey delegated the appeal to another deputy commissioner, who entered an appeal decision on July 29, 2013. In that appeal decision, the commissioner's designee revised the industrial disability award and awarded claimant permanent total disability.

Defendants sought judicial review of the agency's appeal decision. The Iowa District Court affirmed the commissioner's permanent total disability award under a substantial evidence test. Defendants appealed to the Iowa Supreme Court, who assigned the case to the Iowa Court of Appeals.

On January 14, 2015, the Iowa Court of Appeals reversed the agency's appeal decision and remanded this case to the agency for further action. The Iowa Court of Appeals concluded, "the commissioner's designee simply ignored or overlooked record evidence." The Court of Appeals identified three pieces of evidence it determined were not properly considered or weighed in the appeal decision. In fact, the court stated, these "statements regarding the state of the record are demonstrably incorrect." (Court of Appeals Decision, p. 8)

The Iowa Court of Appeals concluded that, "The overlooked evidence is not immaterial; the heart of the appeal decision is based upon the designee's conclusion that Swift failed to provide evidence of available work and that this purported failure of proof demonstrated Swift had only make-work available for Hedberg." (Court of Appeals Decision, pp. 8-9) The Court of Appeals; therefore, remanded the case to this agency for reconsideration of the extent of claimant's permanent disability in light of the full evidentiary record.

In reaching its decision, the Court of Appeals concluded:

> The record reflects the commissioner's designee simply ignored or overlooked record evidence. The appeal decision correctly notes the "arbitration decision and the defendants' arguments that claimant is employable seem[s] to stem from the job offer made by the defendants for sedentary work which would be within claimant's work restrictions." The appeal decision then states "[t]here is no description in the record what kind of work this entailed" and there is "[n]o further explanation of the jobs that Swift stood ready to provide to the claimant appear in the record." The commissioner's designee goes on to state "[e]ven Lana Sellner, the vocational rehabilitation consultant hired by the defendants, did not provide any jobs from the defendants in her labor market survey." All three statements regarding the state of the record are demonstrably incorrect.

Claimant sought further review by the Iowa Supreme Court. However, the Iowa Supreme Court denied further review on October 13, 2015.

Pursuant to the Iowa Court of Appeals' directive this agency is charged on remand with again reviewing the existing evidentiary record, considering the evidence the Court of Appeals determined was overlooked, and entering a new decision based on the totality of the existing record. (Iowa Court of Appeals' Decision, p. 10)

FINDINGS OF FACT

Having reviewed the entire evidentiary record anew and de novo, including those pieces of evidence specifically identified by the Iowa Court of Appeals as having been overlooked in the prior appeal decision, I make the following findings of fact:

Claimant was 57 years old at the time of the hearing. (Joint Stipulation, paragraph 2) Claimant took special education classes in school and graduated from high school. (Exhibit J, page 170; Jt. Stip., para. 3) Claimant has significant hearing loss and has had bilateral hearing aids since he was 11 years old. The presiding deputy commissioner's observation that claimant's speech was, at times, difficult to understand during the hearing is accepted.

Claimant has worked as a dishwasher, delivered food, and helped in a bakery. (Ex. K, p. 176; Ex. L, pp. 219-222) Claimant has been able to overcome his disabilities by having a very positive attitude. (Ex. 1, p. 4)

Claimant began working at Swift on October 1, 1990. (Jt. Stip., para. 1) Claimant's job involved cutting the thyroid out of animal carcasses. Claimant used a hook with his right hand to pull the animal carcasses to him. He used a knife with his left hand to cut out the thyroid. On May 7, 2010, claimant sustained an injury to his right shoulder and arm as a result of his work activities at Swift. (Jt. Stip., para. 4)

In May and June of 2010, claimant was evaluated by Darrell Jebsen, M.D., at the McFarland Clinic with complaints of pain in the right upper extremity. Claimant was assessed as having a possible ulnar nerve entrapment problem. Claimant was treated with medications. (Ex. D, pp. 9-11)

Claimant was put on light duty work at Swift, where he used only his left hand. Claimant worked light duty work from the date of his injury until December 31, 2010. (Jt. stip., para. 6)

In November 2010, claimant was evaluated by orthopaedic surgeon, Scott Neff, D.O. Claimant had right arm pain and some numbness. A MRI was recommended. (Ex. F, pp. 51-52) A MRI performed in November 2010 revealed degenerative changes in the AC joint. (Ex. B, p. 4) EMG and electric diagnostic studies, also performed in November 2010, revealed a mild ulnar tunnel syndrome and a cubital tunnel syndrome on the right. (Ex. C)

In November 2010, claimant returned to Dr. Neff. Claimant was assessed as having cubital tunnel syndrome, AC joint arthritis and impingement syndrome. Arthroscopic surgery of the right shoulder was recommended. (Ex. F, p. 53)

On December 1, 2010, claimant's wife died unexpectedly. (Ex. AA, p. 1)

On December 31, 2010, claimant underwent surgery with Dr. Neff. It consisted of a cubital tunnel decompression and right debridement of the labrum. Dr. Neff's notes indicate claimant was tearful when sutures were removed from surgery. Dr. Neff was unsure if claimant was crying due to the removal of the sutures or because of the death of his wife. (Ex. F, p. 55)

Claimant is unable to live independently and cannot manage his own finances. Therefore, in January of 2011, claimant moved to Minnesota to live with his brother after the death of his wife. (Ex. BB, deposition p. 6)

In a February 21, 2011, letter, Dr. Neff indicated claimant would not be able to return to work for a minimum of three months following surgery. (Ex. F, p. 59) In a March 2011 opinion, Dr. Neff noted claimant had difficulty with communicating, and he was unaware of claimant's reading ability. Dr. Neff opined that claimant could potentially return to work three to four weeks after surgery to a sedentary position. (Ex. F, p. 63)

In May of 2011, Dr. Neff noted that claimant would never be able to return to work doing repetitive overhead work. (Ex. F, p. 65)

In a June 8, 2011, letter, defendants' counsel indicated to claimant's counsel that Swift had sedentary work for claimant to perform within his work restrictions. Defendants' counsel asked if claimant was considering returning to work at Swift. (Ex. N, pp. 225-226)

In a June 16, 2011, letter, written by defense counsel, Dr. Neff indicated he believed claimant would be at maximum medical improvement (MMI) on or about June 30, 2011. He indicated claimant could have returned to sedentary work sometime in early February 2011. Dr. Neff found claimant had no permanent restrictions regarding his cubital tunnel release. Dr. Neff indicated claimant would not be able to return to work doing repetitive intense overhead activities. (Ex. F, pp. 66-67)

In a June 17, 2011, letter, claimant's counsel requested a detailed description of the sedentary work Swift was offering. Claimant's counsel suggested defendants also aid claimant's transportation and supply him with a home health aide, as claimant had no one to assist him with activities of daily living and transportation in Marshalltown since the death of his wife. (Ex. N, p. 228)

Defendants' counsel indicated Swift had no job description for temporary light duty for claimant, but would supply work to claimant within his job restrictions as done previously. Defendants indicated they did not have responsibilities to supply claimant with transportation and someone to help him with his activities of daily living. (Ex. N, p. 229)

In a July 20, 2011, note, Dr. Neff evaluated claimant for the purposes of giving a rating for permanent impairment. He found claimant had no permanent impairment resulting from the cubital tunnel release. Dr. Neff found claimant had 11 percent permanent impairment to the right upper extremity for his shoulder injury. (Ex. F, pp. 69-70)

On that same date, claimant submitted to an independent medical evaluation (IME) performed by Sunil Bansal, M.D. Dr. Bansal recorded that claimant complained of limited strength and mobility in his arm. Claimant also complained to Dr. Bansal of numbness. Claimant complained of difficulty with dressing and doing recreational activities because of his right arm pain.

Dr. Bansal found claimant at MMI on July 20, 2011. He opined claimant had a 26 percent permanent impairment of the right upper extremity for the shoulder injury, converting to a 16 percent permanent impairment of the body as a whole. Dr. Bansal also found claimant had a 6.7 percent permanent impairment of the upper extremity for the cubital tunnel release, converting to a four percent impairment of the body as a whole. Dr. Bansal limited claimant to no lifting more than 15 pounds, and no pushing or pulling more than 20 pounds. (Ex. G)

Six days after his final evaluation by Dr. Neff and his IME with Dr. Bansal, claimant sought evaluation by Kara L. Lewis, N.P., at the Family Practice Department of Fairview Northland Medical Center in Minnesota. At this July 26, 2011, evaluation, claimant reported, "Has been working on building a gazebo this past week." (Ex. H, p. 96) Claimant confirmed at trial that he did assist in the building of a gazebo at his brother's cabin.

Claimant's activities building a gazebo during the week after his final evaluation with Dr. Neff and his IME with Dr. Bansal demonstrates the findings and restrictions outlined by Dr. Neff to be more consistent with claimant's actual life activities than those outlined by Dr. Bansal. For this reason, as well as the fact that Dr. Neff had the opportunity to evaluate claimant numerous times including intra-operatively, I find the opinions of Dr. Neff to be the most convincing on the issues of permanent impairment and permanent work restrictions.

In a letter dated July 28, 2011, claimant was notified he would be terminated from Swift because he had been released to return to work but had failed to do so. Claimant was given until August 8, 2011, to contact Swift. (Ex. N, p. 231)

In his deposition, claimant testified he would like to go back to a dishwashing job similar to that which he performed before moving to Iowa. (Ex. Q, p. 116) Claimant's brother testified via deposition that he thought claimant would be able to return to work

after he moved to Minnesota and only after claimant's diagnosis of Alzheimer's does he believe claimant will not be able to return to work. (Ex. BB, pp. 66-67)

In an August 31, 2011, report, Carma Mitchell, M.S., C.R.C, gave her opinions of claimant's vocational opportunities. Ms. Mitchell opined claimant lost access to 69 percent of the jobs he had access to prior to his work injury. Ms. Mitchell opined claimant could have access to jobs including stocking, washing vehicles, and in packaging. She opined these jobs would pay 31 percent less than claimant was receiving at Swift. Ms. Mitchell opined that, given claimant's limitations with his shoulder, his limited intellectual ability, hearing loss, and speech impediment, claimant would not be able to obtain full-time competitive employment. (Ex. J)

On January 3, 2012, claimant's brother, Robert Hedberg, contacted Fairview Northland Medical Center reporting claimant was disoriented, confused, and threatening to hurt Robert's children. (Ex. H, p. 111) Claimant was seen walking in a neighborhood in his bathrobe and broke into a neighbor's home. (Ex. I, pp. 164-166) Claimant was hospitalized and tested. He was assessed as having Alzheimer's disease and dementia with delusions. (Ex. H, pp. 119, 128-130) The parties stipulated that claimant's Alzheimer's and dementia issues are not related to his May 7, 2010 injury. (Jt. stip., para. 5)

In a May 2012 letter, written by defendants' counsel, Dr. Neff indicated claimant had permanent restrictions to his right upper extremity, indicating claimant should avoid repetitive overhead activities with his right upper extremity. Dr. Neff noted claimant had no permanent restrictions regarding his left upper extremity. (Ex. F, pp. 71-72)

In a May 2012 letter to claimant's counsel, defendants' counsel noted that claimant had received treatment for mental health issues. It was defendants' counsel's understanding that claimant was limiting his claim to his right upper extremity problems. (Ex. N, p. 232)

In a May 23, 2012, report, Lana Sellner, M.S., C.R.C., gave her opinions of claimant's vocational opportunities following a records review. Ms. Sellner performed a labor market summary for claimant in the Marshalltown and Elk River, Minnesota, area (where claimant resided with his brother). Ms. Sellner applied restrictions from Dr. Neff and Dr. Bansal. She found claimant was employable in the Marshalltown and Elk River areas. Ms. Sellner also found there were jobs at Swift claimant could perform. This included seven positions at Swift. (Ex. K)

In a June 2012 report, Arthur Konar, Ph.D., gave his opinions of claimant's mental health condition following an IME. He found claimant had a major depressive disorder and generalized anxiety disorder. He opined claimant's motor vehicle accident of November 19, 2010, created claimant's issues with depression and anxiety. Dr. Konar opined claimant would benefit from a cognitive therapy program for depression

and anxiety. He did not find claimant was at MMI for his mental health issues. He found it was impossible for claimant to return to work given his mental health condition. (Ex. 1)

In a June 2012 report, Philip Ascheman, Ph.D., gave his opinions of claimant's mental health following an IME. Claimant indicated that he was both doing "okay" and got "real depressed." Claimant indicated his wife's death was the reason for his depression. Testing showed claimant had significant memory problems consistent with dementia. Dr. Ascheman assessed claimant as having dementia. He found claimant's mental health condition was not related to his right upper extremity condition. He opined that claimant's depression was attributable to his loss of his wife and his dementia. (Ex. AA)

Claimant testified that since his surgery, he has had problem with pain and with stiffness in his right shoulder. Claimant has problems with reaching. He said he did not think he could return to his job removing thyroids at Swift. He said he is left-handed. Claimant testified he would still be working at Swift if his wife had not died.

Robert Hedberg testified he is claimant's brother. Claimant has lived with Robert and his family since January 2011 in Otsego, Minnesota. (Ex. BB, pp. 3-7) He testified in deposition that claimant closed his bank account in Marshalltown, that claimant stopped paying his mortgage and that he moved all his belongings to Minnesota. (Ex. BB, dep. pp. 54-55) Claimant sent a letter to Swift requesting all benefits and notices be sent to his brother's address in Minnesota. (Ex. M, p. 224)

Robert testified in deposition that if claimant had not injured his right shoulder, claimant would still have moved to Minnesota due to the death of his wife. (Ex. BB, p. 36) Robert testified at hearing that claimant has pain doing things with his right shoulder. He indicated claimant is reluctant to stop doing chores around the house. He said he knows, by watching claimant, that claimant has difficulty doing household chores. He said he has noticed claimant's sadness due to physical limitations from his right shoulder.

Robert testified Dr. Neff told him claimant would not be able to return to work at Swift. He said he did not believe claimant could return to work at Swift. Robert also testified he has no knowledge of the work claimant performed at Swift and has never visited the Swift plant. He said that he had heard claimant had been offered a job to return to work at Swift. He said it was not within the family's plan to have claimant return to work at Swift.

Robert testified claimant has a mental handicap. He said claimant has been diagnosed with having Alzheimer's disease. He said claimant is unable to perform clerical work due to his mental handicap.

Having found Dr. Neff's opinions to be most convincing on the issue of permanent impairment and permanent work restrictions, I find that claimant's only permanent work restriction as a result of the right arm and right shoulder injury is avoidance of repetitive overhead activities with his right upper extremity or shoulder. (Ex. F, pp. 69-72)

I concur with the presiding deputy commissioner's finding of fact regarding claimant's depression. Dr. Ascheman's opinions are most consistent with the factual record and more convincing than those offered by Dr. Konar on this record. Therefore, similar to the presiding deputy commissioner, I find that claimant failed to prove by a preponderance of the evidence that his mental health injury was caused by his May 7, 2010, work injury.

With respect to the vocational opinions offered in this case, I find the opinions of Ms. Sellner to be most convincing. Ms. Sellner performed specific labor market analyses in the Marshalltown area as well as in claimant's current area of residence. Ms. Sellner identified specific job openings in the labor markets that are consistent with both Dr. Neff's and Dr. Bansal's restrictions. Ms. Sellner also reviewed and confirmed that there are several positions within the Swift plant which are consistent with the restrictions offered by Dr. Neff.

Review of Ms. Mitchell's vocational report discloses she relies exclusively upon and only applies the work restrictions imposed by Dr. Bansal. Having noted claimant performed physical activities immediately after Dr. Bansal's evaluation that seem inconsistent with Dr. Bansal's analysis and restrictions, I found Dr. Neff's restrictions to be most convincing. Given that Ms. Sellner considered the restrictions of Dr. Neff and Ms. Mitchell did not even consider those or apply those restrictions, I find the opinions of Ms. Sellner to be more thorough and convincing on this record.

Therefore, I find that claimant sustained a significant loss of future earning capacity as a result of the May 7, 2010, work injury. However, similar to the presiding deputy commissioner, I find that claimant failed to prove he is permanently and totally disabled. Rather, I find there remain viable full-time and competitive employment opportunities available to claimant within the labor markets in Marshalltown and in claimant's new area of residence which are consistent with the restrictions imposed by the treating surgeon, Dr. Neff, for the injury of May 7, 2010. I find that claimant remains capable of obtaining and performing employment similar to those opportunities identified by Ms. Sellner and that such opportunities remain available for claimant within the competitive labor market.

Claimant is an admirable man. He has overcome disabilities. He is a hard-working individual. Unfortunately, he has now experienced some significant hardships, including this injury, the death of his wife, relocation to Minnesota, and development of

Alzeimer's disease. However, the May 2010 work injury did not render Mr. Hedberg unemployable or permanently and totally disabled.

Although claimant is not currently likely to be able to perform the potential jobs which remained available to him after recovery from the May 7, 2010, work injury, I find the reason he is not currently likely able to perform those jobs is due to his mental health issues and his Alzeimer's disease. Neither condition is related to the May 7, 2010, work injury. Therefore, I find claimant has proven he sustained an 80 percent loss of future earning capacity as a result of the May 7, 2010, work injury.

CONCLUSIONS OF LAW

The primary issue for resolution on remand is the extent of claimant's entitlement to permanent disability benefits. Claimant's injury includes a right shoulder injury. When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa Supreme Court formally adopted the "odd-lot doctrine". Under that doctrine, a worker becomes an odd-lot employee when injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled

if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." Id. at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. When the worker makes a prima facie case of total disability by producing substantial evidence the worker is non-employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence, and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful efforts to find steady employment, vocational or other expert evidence demonstrating that suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and the potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of facts is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried. Only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Claimant presented a prima facie case of odd-lot status by producing the vocational opinions of Ms. Mitchell, coupled with the medical opinions of Dr. Bansal and the testimony of himself and his brother. Defendants responded to the prima facie case and produced a competing vocational report and competing medical restrictions. Therefore, the burden was upon claimant to carry the burden of persuasion to establish that suitable work was not available to him. Having found that claimant remains capable of performing competitive employment, and competitive employment opportunities remain available within claimant's work restrictions and his other abilities, I conclude claimant failed to establish his odd-lot claim. Similarly, I conclude claimant failed to prove he is permanently and totally disabled under a traditional industrial disability analysis.

Having considered claimants' age, educational background, employment history, motivation, other pertinent disabilities and limitations that pre-existed the date of injury, as well as claimant's permanent impairment, permanent restrictions, and all other factors of industrial disability as identified by the Iowa Supreme Court, I find that claimant sustained an 80 percent loss of his future earning capacity as a result of the May 7, 2010, work injury. Therefore, I conclude claimant is entitled to an 80 percent industrial disability award, or 400 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). The parties stipulated that permanent disability benefits should commence on July 10, 2011. (Hearing Report)

The Iowa Court of Appeals' decision is not clear whether the issue of healing period benefits is also remanded for consideration. However, to the extent necessary, I accept and adopt the presiding deputy commissioner's analysis, findings and conclusions regarding any claim for healing period benefits.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant four hundred (400) weeks of permanent partial disability benefits at the rate of four hundred thirty and 27/100 dollars ($430.27) per week commencing on July 10, 2011.

Defendants shall pay accrued weekly benefits in lump sum.

Defendants shall pay interest on unpaid weekly benefits as ordered above as set forth in Iowa Code section 85.30.

Defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Defendants shall pay the cost of this matter as required under rule 876 IAC 4.33.

Signed and filed this 8th day of January, 2016.

Joseph S Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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